BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAUL HURTADO, JR. Claimant	)	
VS.	)	
I & A PAINTING AND REMODELING Respondent	)	Docket No. 1,058,894
AND	)	
PHOENIX INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 28, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. John B. Gariglietti, of Pittsburg, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found that claimant sustained personal injury on November 11, 2011, when claimant, who suffers from epilepsy, fell off a ladder. The ALJ, however, found that claimant's preexisting seizure disorder caused the fall off the ladder, claimant's injury and claimant's need for medical treatment and denied his request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 9, 2012, Preliminary Hearing and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Claimant asks that the Order of the ALJ be reversed. Claimant argues that although he has a preexisting seizure disorder, which is a personal risk of claimant, he was working on a ladder at the time of his fall, which was an employment hazard associated with his job which put him at an increased risk of injury.

Respondent asserts the Order of the ALJ should be affirmed. Respondent argues that the prevailing factor in claimant's injury and need for medical treatment was his seizure disorder. Further, respondent contends the 2011 amendments to the Workers Compensation Act exclude compensation for injuries caused by a claimant's personal risks.

The issue for the Board's review is: What was the prevailing factor in claimant's injury and need for medical treatment?

FINDINGS OF FACT

Claimant had been working for respondent for two or three months when, on November 11, 2011, he had a seizure while working on a ladder. The seizure caused claimant to black out and he fell from the ladder, injuring his neck, back and other body parts. Claimant admits he had a preexisting condition, epilepsy, which caused him to have seizures, and it was common for him to have seizures. Claimant stated he has had two previous car accidents caused by seizures, as well as a previous workers compensation claim which occurred in 2007, when he also fell from a ladder and injured his back.

Claimant testified that respondent was aware of his condition and that one to two weeks before the November 11, 2011, accident, claimant had a seizure while working for respondent. Nevertheless, claimant was instructed to "work outside," which claimant said involved climbing a ladder.[1]

Claimant was taken to the hospital by ambulance. Surgery was performed on his cervical spine on November 12, 2011.

Claimant was seen by Dr. George Fluter on February 15, 2012, at the request of claimant's attorney. Dr. Fluter diagnosed claimant with C7 burst fracture with spinal canal compromise; L5 superior endplate fracture; and left transverse process fractures of the second, third and fourth lumbar vertebrae. Dr. Fluter concluded:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported injury of 11/11/11 and its sequelae.
>
> The prevailing factor is the injury occurring on that date. More than the seizure per se, the fall from height resulted in the injuries.[2]

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[1] P.H. Trans. at 12.

[2] P.H. Trans., Cl. Ex. 1 at 6.

Claimant was seen on June 20, 2012, by Dr. Joseph Galate at the request of the ALJ. Dr. Galate found that claimant had sustained a burst fracture at C7 and a superior endplate compression fracture at L5. Dr. Galate opined:

> I am currently leaning towards the patient's seizure disorder being the prevailing factor for the patient falling off a ladder and sustaining a burst fracture at C7 and a compression fracture at L5. The fall and subsequent fractures were secondary to the patient having a seizure while standing on a ladder.[3]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(d) states in part:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> . . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or

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[3] P.H. Trans., Resp. Ex. 3 at 6.

> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . . .
>
> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

In *Bennett*,[4] the Kansas Court of Appeals stated:

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed. [Citation omitted.]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The ALJ found that the claim is barred because a preexisting condition was the prevailing factor in causing the injury and need for medical treatment. This Board member agrees. The primary factor, notwithstanding any other, for causing claimant's injury was an epileptic seizure.

Claimant argues that the claim is compensable under the concurrence rule contained in *Bennett*, which provides that when an "injury results from the concurrence of some preexisting idiopathic condition and some hazard of employment, compensation is

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[4] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

generally allowed."[7] Had this injury occurred prior to the 2011 legislative changes to K.S.A. 2011 Supp. 44-508, the claim would clearly be compensable under the "concurrence rule." However, it is the opinion of this Board member that the "concurrence rule" is no longer the rule of law for injuries occurring after May 15, 2011.

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[8]

The new act contains at least three provisions that exclude this claim from being compensable. The first, as noted above, is the prevailing factor requirement contained in K.S.A. 2011 Supp. 44-508(f). K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv) specifically excludes accidents or injuries which arise "either directly or indirectly from idiopathic causes." K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii) excludes accidents or injuries which arise out of a risk personal to the worker.

The Court of Appeals, in *Bennett*, tells us that a seizure, as the cause of an accident, is a personal/idiopathic cause. The court in *Bissen* also uses the phrase "personal condition" and the term "idiopathic" interchangeably.[9] Climbing a ladder, knowing that you suffer from epileptic seizures, is certainly a personal risk.

Based upon the plain language contained in K.S.A. 2011 Supp. 44-508, this Board member finds that the accidental injury in this case was caused directly or indirectly by, according to *Bennett*, an idiopathic cause and a risk personal to claimant. The prevailing factor in causing the injury was a personal condition, not the normal conditions of employment.

CONCLUSION

Based upon the foregoing, this Board member finds that claimant's accident was caused directly or indirectly by an idiopathic cause and arose from a risk personal to claimant.

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[7] *Bissen v. Hy-Vee Food Stores*, No. 92,457, 102 P.3d 1205 (Kansas Court of Appeals unpublished opinion filed December 30, 2004), citing *Bennett v. Wichita Fence Co.*, 16 Kan.App.2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[8] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009), citing *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

[9] 102 P.3d 1205

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 28, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge